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IN THE SUPREME COURT OF THE UNITED STATES

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Petitioner,

v.

ANTHONY GRAVES,
Respondent.

On Petition For Writ of Certiorari to the
Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in determining that Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecution allegedly failed to disclose that Robert Carter claimed to have committed the murders alone.

2. Whether Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the prosecution's failure to disclose Carter's statement that his wife Theresa "Cookie" Carter participated in the commission of the murders with him and Anthony Graves.

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PETITION FOR WRIT OF CERTIORARI

The lower court's decision does not conflict with various state courts of last resort or United States Courts of Appeals. Nevertheless, the Court should grant this petition because the United States Court of Appeals for the Fifth Circuit erroneously held that Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecution allegedly failed to disclose that Graves' co-defendant Robert Carter claimed to have committed the murders alone.

The United States Court of Appeals for the Fifth Circuit also erroneously held that Graves' rights under *Brady v. Maryland,* 373 U.S. 83 (1963) were violated by the prosecution's failure to disclose Carter's statement that his wife Theresa "Cookie" Carter participated in the commission of the murders with him and Anthony Graves.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit reversed the district court's judgment denying habeas relief with instructions for the lower court to grant Graves' petition fo writ of habeas corpus based on *Brady v. Maryland. Graves v. Dretke*,442 F.3d 334 (5th Cir. 2006); *see also* Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on March 3, 2006. Thus, Respondent's petition for writ of certiorari is timely filed on or before June 1, 2006. SUP. CT. R. 13.3. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"[N]or shall any State deprive any person of life, liberty, or property without due process of law. . ." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals summarized the relevant facts in its opinion on state habeas review:

> A Burleson County Texas grand jury indicted [Graves] in May 1994 for intentionally and knowingly causing the stabbing and shooting deaths of one adult and five children. The evidence at trial showed that in the early morning hours of August 18, 1992, [Graves] and an accomplice, Robert Carter, killed all six victims in a home belonging to the adult victim. [Graves'] motive was anger at the female homeowner for receiving a job promotion he thought his mother should have received. The five slain children just happened to be in the house at the time. After stabbing and shooting the victims, applicant and Carter used gasoline to burn the house. When police officers first questioned [Carter], he implicated himself and [Graves] in the murders and arson. Both [Graves] and Carter later testified before the grand jury and denied any involvement. While [Graves] and Carter were both in county jail awaiting trial, however, several witnesses overheard them make incriminating statements to each other. FN2
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> FN2. [Graves] and Carter occupied cells directly opposite one another and conversed across this distance. While delivering food to the jail, a

> Burleson County Jail employee overheard [Graves] say to Carter, "[w]e fucked up big time." Another employee heard [Graves] tell Carter, "[k]eep your damn mouth shut. I done the job for you. Make them make their own damn case." That same evening, a jailer overheard [Graves] tell [Carter], "[y]eah, motherfucker, I did it, keep your mouth shut!"

The State tried Robert Carter first. A jury convicted Carter of capital murder and sentenced him to death. He then testified against [Graves] at [Graves'] trial in exchange for the State's promise not to prosecute Carter's wife, who had also been indicted for this capital murder.FN3 [Graves] presented an alibi defense, offering evidence that he had spent the evening of the murders with his girlfriend, Yolanda Mathis. He claimed that [Carter] "framed" him.

> FN3. Shortly before his own execution, the accomplice, Robert Earl Carter, was deposed in prison and recanted his trial testimony. Carter claimed that [Graves] had nothing to do with the murders; that he, Carter, committed the murders alone; and that he had never known [Graves] to carry a knife. Several witnesses at [Graves'] trial had testified, however, that [Graves] owned a switchblade knife that matched "like a glove" the wounds that caused the death of five of the six victims.

After a twelve day trial, the jury convicted [Graves] of capital murder. The jury answered "yes" to article 37.071 special issues 1 and 2 and "no" to special issue 3. Accordingly, on November 3, 1994, the trial court assessed

the death penalty against applicant.

Ex parte Graves, 70 S.W.3d 103. 105 (Tex. Crim. App. 2002) (original footnotes).

II. Facts Relating to the Fourteenth Amendment Claim

The district court adopted the federal magistrate's summary of the facts of the offense and evidence adduced at the federal evidentiary hearing regarding Graves' *Brady* claims as follows:

> In the early morning hours of August 18, 1992, Bobbie Davis, Nicole Davis, Demitra Davis, Brittany Davis Lea'Erin Davis, and Jason Davis were murdered in Burleson County, Texas. Bobbie and Nicole both suffered wounds from a knife, a hammer, and a .22 caliber gun. The remaining four children, aged four to nine, were stabbed to death. Robert Carter, the father of four-year-old Jason Davis, was soon arrested for his involvement in the killings. He was subsequently convicted in 1994 of capital murder and sentenced to death.[1]

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[1] During his testimony at Graves' trial, Carter explained his and Graves' motives for the murders. Carter told the jury that a week or two before the instant offense, he and Graves met and discussed their respective problems with Bobbie Davis and her daughter, L.D., Carter's girlfriend. L.D. had informed Carter that she was filing a paternity suit against him to arrange for the support of their son, Jason Davis. Carter feared that the court would order an amount of child support which would ruin his credit record. Also, Carter had continued to date L.D. after marrying Cookie Carter, Graves' first cousin. Further, Cookie had recently given Carter an ultimatum demanding that he end his relationship with

Carter's wife, Cookie, was also indicted for the offense of capital murder. Attorneys Calvin Garvie and Lydia Clay-Jackson, who defended Graves at trial, believed this indictment to be a sham based on false evidence presented to the grand jury and obtained only in order to pressure Carter to testify against Graves. Evidentiary Hearing Transcript ("EHT") at 129, 168. Nevertheless, Burleson County District Attorney Charles Sebesta, who prosecuted Graves, insisted that the State believed from early on that Cookie participated in the killings and that all evidence pointed to the involvement of three people. *Id.* at 57, 98. Indeed, the State's theory from the beginning of the trial was that at least three people had acted together in the murders. *Id.* at 174. Texas Ranger Coffman testified at trial that his investigation showed "at least three and possibly four" perpetrators were in the Davis home when the murders occurred.

Prior to the beginning of Graves' trial, the District Attorney's office had been in negotiations with Carter and his appellate attorney for Carter's testimony against Graves. According to Sebesta, no final agreement on the terms had been reached prior to Carter's arrival in Brazoria County for Graves' trial, although any final plan was to involve the use of a polygraph exam before he testified. The early

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L.D. Similarly, L.D. pressured Carter to end his relationship with Cookie. According to Carter, Graves was angry with Bobbie Davis, whom Graves believed received a promotion that his mother, Dorris Curry should have received due to Bobbie's relationship with the unit director at the Brenham State School where the two women were employed.

discussions also involved Carter's condition that the State would not ask him questions about his wife's role in the murders. *Id.* at 54.

Sebesta met with Carter in the early evening of October 21, 1994. According to Sebesta, Carter almost immediately claimed, "I did it all myself, Mr. Sebesta. I did it all myself." *Id.* at 60. When Sebesta stated that he knew that was not true because of the number of weapons used, Carter quickly changed his story and claimed that he committed the murders with Graves and a third man called "Red." *Id.* at 61, 94, 95. Carter had earlier implicated a person named "Red" during the murder investigation, and the State believed that Theresa Carter may have been known by that nickname. [Graves'] Ex. 9 at 24. When Sebesta proposed that "Red" was actually Cookie, Carter denied it and agreed to take a polygraph exam. EHT at 95.

Since the polygraph examiner had been out sick that day, he was called to come in to administer the exam. *Id.* at 96. The report states that Carter signed a polygraph release statement, had the exam explained to him, and then changed his story once more before the exam was given by stating that he had killed the Davis family with Graves but without "Red." [Graves'] Ex. 9 at tab 4. The interviewer then posed the following question to Carter: (1) ["W]as your wife, Theresa, with you [at the time of the murders]?" and (2) "[W]hen you refer to 'Red' in your statement, are you talking about your wife, Theresa?" *Id.* Carter answered "no" to both questions. The polygraph examiner concluded that Carter was not being truthful in either response. *Id.* When the polygraph results were explained to him, Carter once more changed his story. He now admitted that Cookie was involved in the murders with himself and Graves. He

also stated that he had invented the character "Red" but later admitted that Cookie was sometimes called "Red." *Id.* When Sebesta asked him if Theresa had used the hammer in the murder, Carter answered "yes." EHT at 96.

In addition to the tentative deal to forego questions about Cookie in exchange for testifying against Graves, the State had also been working on a broader agreement that would allow Carter to accept a life sentence rather than death if his case were reversed on appeal. This required Carter to testify against both Graves and Cookie. *Id.* at 67. By the time the October 21 meeting concluded, he had tentatively assented to do so, though no final agreement was reached. *Id.* at 62, 103, 105. The next morning, however, Carter refused to testify against Cookie and reverted to the initial terms already worked out with the State. Both Carter and Sebesta then accepted the tentative agreement as the final deal for his testimony.

At the evidentiary hearing [Graves' attorney] Garvie denied that he knew before, or at any time during, trial that Carter had told Sebesta he killed the Davis family himself. Sebesta testified that he mentioned the statement to Garvie on the morning Carter testified. *Id.* at 149. The Court accepts Garvie's version of the event based on his credibility as a witness and as being consistent with his vigorous defense of Graves at trial. Sebesta did reveal part of the polygraph results on the morning of October 22 when he told the trial judge: "last night at 8:30 Carter took a polygraph[,] and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But obviously, we can't go into polygraphs here, but I think counsel is certainly entitled to know that." Garvie asked no questions about what the polygraph involved. Garvie's

co-counsel testified that it did not occur to the defense to inquire into Sebesta's statement because they believed the indictment against Cookie was unfounded. EHT at 134. Nor did it fit the defense's theory of the case. According to Ms. Clay-Jackson, the defense thought that at least two people were involved in the killings but that Cookie was not one of them. *Id.* at 122. The State then called Carter to the stand and revealed to the jury that he was testifying in exchange for an agreement that questions would not be asked about his wife.

Graves' habeas attorneys appear to have first learned of Carter's statement, "I did it all myself," in 1998. On June 19, 1998, Graves' former attorney took a deposition from Carter in which he claimed to have acted alone. *Ex parte Graves*, No. 40,812-01 at 97 ff. That statement was excluded from the record by the state court as inherently unreliable because Graves' attorney failed to notify the State, as required by law, in order to allow cross-examination. Carter again recanted his trial testimony in a May 18, 2000, deposition attended by both Sebesta and Graves' current counsel. Sebesta later appeared on the Geraldo Rivera show Deadly Justice on September 3, 2000, and repeated Carter's self-confession. Sebesta stated: "yes, and at that point he [Carter] did tell us, 'Oh, I did it myself. I did it.' He did tell us that." [Graves'] Ex. 1.

See Appendix B at 2-5 (Magistrate's Report and Recommendation).

III. State and Federal Court Proceedings

Graves was indicted, convicted, and sentenced to death for murdering Bobbie Joyce Davis, Nicole Davis, Lea'Erin Davis, Brittany Davis, Jason Davis, and Denitra Davis in the same criminal transaction. Tr 549-55. The Texas Court of Criminal Appeals affirmed Graves' conviction and sentence. *Graves v. State*, No. 72,042 (Tex. Crim. App. April 23, 1997); *Graves v. State*, 950 S.W.2d 374 (Tex. Crim. App. 1997) (Keller, J., concurring). Graves did not seek certiorari review in this Court.

In June 1998, Graves filed an application for writ of habeas corpus in state court. After an evidentiary hearing, the convicting court filed findings of fact and conclusions of law recommending relief be denied. The Court of Criminal Appeals subsequently ordered the case filed and set for submission on two claims, and ultimately denied relief. *Ex parte Graves*, No. 73,424 (Tex. Crim. App. Feb. 9, 2000). Graves then filed a subsequent application for writ of habeas corpus alleging the instant claims, which was dismissed as an abuse of the writ. *Ex parte Graves*, No. 40,812-02 (Tex. Crim. App. Feb. 16, 2000). Next, Graves filed a second subsequent application for state habeas relief in March 2000, and an amendment to his second subsequent application in July 2000, which the Court of Criminal Appeals set for submission to determine whether Graves had a statutory or constitutional right to the effective assistance of state habeas counsel, which, if proven, would entitle him to review of his second subsequent application. On January 2, 2002, the court answered in the negative and dismissed the application as an abuse of the writ. *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). The court denied rehearing on March 6, 2002.

Meanwhile, on Graves' motion, the United States District Court for the Western District of Texas granted a deposition of recanting

trial witness Robert Earl Carter, who was set to be executed. *Ex parte Graves*, No. A-00-CA-130-JN (W.D. Tex.) (Order of Feb. 22, 2000). Carter was deposed on May 18, 2000. The Western District then dismissed the case. *Id.* (Order of June 2, 2000). The United States District Court for the Southern District of Texas subsequently granted an agreed scheduling motion. *See Graves v. Johnson*, No. G-00-221 (S.D. Tex.) (Order of May 23, 2000). Before Graves could file his petition in the Southern District, however, the Court of Criminal Appeals filed and set for submission Graves' second subsequent state habeas application. Accordingly, the district court granted Graves' motion to abate federal proceedings until the state court proceedings had been completed.

After the Court of Criminal Appeals dismissed Graves' successive application on January 2, 2002, and denied rehearing, the district court granted Graves' motion to lift its abatement order and reinstate federal proceedings.

Graves timely filed the instant federal habeas petition on May 13, 2002. On September 6, 2002, District Judge Samuel Kent issued an opinion denying relief. Subsequently, on October 9, 2002, the district court denied a certificate of appealability ("COA") on each of Graves' allegations.

In two opinions delivered on August 15, 2003, and November 13, 2003, respectively, the Fifth Circuit determined that Graves had established cause for the procedural default of his *Brady* claims because the State did not disclose Carter's statements until after Graves filed his initial habeas petition. *Graves v. Cockrell*, 351 F.3d 143, 154 (5th Cir. 2003); *Graves v. Cockrell*, 351 F.3d 156, 158 (5th Cir. 2003). The appellate court also granted COA on the issue of whether the district court erred in denying Graves' *Brady* claims and remanded the case to the district court for an evidentiary

hearing. *Id.* After an evidentiary hearing conducted on September 28-29, 2004, before the district court magistrate, the district court adopted the magistrate's report and recommendation and entered and order and opinion denying relief on Graves' claims but granting Graves' request for COA. *Graves v. Dretke*, No. G-00-221 (S.D. Tex. (Magistrate's Report and recommendation, November 8, 2005); *Graves v. Dretke*, No. G-00-221 (S.D. Tex.) (Orders of February 16, 2005, and March. 17, 2005); *see also* Appendixes B, C, D, and E respectively.

Following additional briefing and oral argument on the merits in the Fifth Circuit, the Court of Appeals reversed the district court judgment. *Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006); *see also* Appendix A. The instant petition followed.

REASONS FOR GRANTING THE WRIT

The court below erred in concluding that Graves' rights under *Brady v. Maryland* were violated by the State's failure to disclose two statements made by Robert Carter to former district attorney Charles Sebesta on the eve of Carter's testimony against Graves. *Graves v. Dretke*, 442 F.3d at 345; *see also* Appendix A. According to Graves, Carter's first statement - - "I did it all myself" - - exonerated Graves and claimed sole responsibility for the murders. *Id.* Also, according to Graves, Carter's second statement, made later that same evening, inculpated himself and implicated his wife Theresa "Cookie" Carter in the murders. *Id.* Graves urged that the district court erred in determining that neither of the statements, either considered individually or together, were material. The Court of Appeals agreed. However, the appellate court erred. Given the substance of the statements, the State's and defense's theories of the case, and the evidence presented to the jury, Graves failed to demonstrate a reasonable probability that the result of the proceeding would have been different had the statements been

disclosed.

To obtain federal habeas relief based on a violation of due process under *Brady v. Maryland*, Graves bore the burden of demonstrating that (1) the State suppressed evidence, (2) favorable to the defense, and (3) material as to issues of guilt or punishment. *Brady*, 383 U.S. at 87. Evidence is "material" within the meaning of *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed; a "reasonable probability" is one sufficient to undermine confidence in the outcome. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Because Graves failed to meet these standards, the lower court incorrectly determined that Carter's statements were material to Graves' conviction and erred in reversing the judgment of the district court.

I. Carter's "I did it myself" Statement is Immaterial.

The Fifth Circuit determined that Carter's mid-trial statement that he acted alone was "particularly significant because it was the first statement Carter made that implicated himself without also implicating Graves." *Graves v. Dretke*, 442 F.3d at 341; *see also* Appendix A. The court noted that at trial, the State emphasized Carter's consistency in naming Graves as an accomplice. *Id.* Due to the number of inconsistent statements Carter had made, the court reasoned that the State faced a difficult job of persuading the jury that Carter was a credible witness. *Id.* As such, the court concluded, "had the defense been able to cross-examine Carter on the suppressed statement, this may well have swayed one or more jurors to reject Carter's trial version of the events." *Id.* But, this analysis ignores the fact that the jury also heard testimony from jailers who overheard Graves inculpate himself and express a desire to protect his cousin Cookie. Contrary to Graves' assertions and the Fifth Circuit's conclusion, Carter's statement was not material. As

the district court reasoned:

> The exculpatory statement fitted neither the State's three-person theory (which the jury heard) nor the defense's belief that at least two people were involved. Both trial attorneys testified that the number of victims and weapons used made it reasonable to conclude that more than one person was involved. EHT at 125, 162. It is difficult to see why there is a reasonable probability a jury would have believed Carter acted alone when Graves' own counsel admitted it was reasonable to find otherwise. Obviously, Carter's testimony that he and Graves did the deeds themselves does not fully match the three-person theory, but the jury also knew that Carter was protecting Cookie.

See Appendix B at 9 (Magistrate's Report and Recommendation).

Likewise flawed is the appellate court's reasoning that the statement is material because it would have shown that Carter only implicated Graves under coercion. Importantly, this reasoning ignores the fact that Carter had implicated Graves from the very beginning. More importantly, it ignores Ranger Coffman's testimony that Carter first implicated Graves on August 23, 1982, the night he was arrested, some five days after the murders. 37 SR[2] 3583-97; SX 191. Thus, the jury knew that Carter had implicated Graves long before he made the statement in question to Sebesta on the eve of his testimony at Graves' trial.

Finally, there is no reasonable probability that the "I did it myself" statement could have impeached Carter's credibility as a

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[2] "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number. "SX" refers to the State's trial exhibits, followed by exhibit number.

witness. As the district court properly recognized, the impeachment value of this statement must be analyzed within the context in which it was given. The court must take into consideration all of the statements heard by the jury, including Carter's admission that he had previously given four to five different accounts, and that his current testimony differed from his own trial. *See* Appendix B at 13 (Magistrate's Report and Recommendation). The district court noted that "the jury also knew the terms of Carter's agreement with the State and the motive that might have given [sic] him for testifying against Graves in order to protect his wife." *Id.* Given the aforementioned, the district court logically concluded:

> In light of the fact that Carter's claim to have acted alone contradicted the evidence, and the fact that the jury already had considerable evidence before it of Carter's multiple inconsistencies and credibility issues, the Court cannot find that it is reasonably probable that disclosing the statement would have led to a different outcome.

Id. In light of the foregoing, the Fifth Circuit's holding to the contrary is in error and certiorari review is warranted.

II. Carter's Statement Implicating Cookie, Himself, and Graves is Immaterial.

The Fifth Circuit determined that "the district court did not reach the materiality of the statement." *Graves v. Dretke*, 442 F.3d at 343; *see also* Appendix A. However, a review of the district court's Report and Recommendation belies this conclusion. The district court addressed both the materiality and the exculpatory[3]

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[3] Contrary to the Fifth Circuit's conclusion, the second statement is not exculpatory. First, while the statement implicates Carter's wife Cookie, it also implicates Graves. Both of Graves' trial counsel admitted this at the federal

nature of the second statement, soundly reasoning:

> [Graves] argues that Carter's statement was material and exculpatory because the State believed "at least two persons" committed the murder. He claims evidence that Cookie was one of the killers would haves significantly weakened the argument that Graves was also involved because it accounted for the two-person scenario without him. [Graves' Post-hearing] Brief at 14. [Graves'] argument works only if "at least two persons" is construed to mean that "only two persons" were responsible for the Davis murders. Had the prosecution believed that only two people were involved, then Carter's statement would have been material because it could have deflected suspicion away from Graves as the second killer. But the State never presented such a theory to the jury. It consistently believed that at least three persons were involved and presented its case accordingly. EHT at 98. Carter's statement implicating Graves and Cookie fits that theory and would not have been exculpatory on the basis [Graves] argues. Garvie confirmed this at the hearing by admitting that any implication of [Graves] and Cookie together would not have helped the defense. EHT at 173. The fact that Carter's statement matched up with the State's three-person theory could even have lent it credibility, which would have been damaging to [Graves].
>
> The statement could also have harmed [Graves'] attack on the State's motive theory. The State believed that Graves was motivated, in part, by his close relationship with

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evidentiary hearing. EHT at 117, 158. Furthermore, as the district court noted, the statement is consistent with the State's "at least three person" theory of the case.

> Cookie, who was his cousin. The defense used Tremetra Ray to show that the two cousins were not close at all. As stated above, however, Ray's testimony contained the central claim that Cookie and Carter were at home together when the murders occurred. Carter's confession that Cookie was involved would have directly contradicted this and could have led the jury to question Ray's credibility as a defense witness even more than it did.

See Appendix B at 16-17 (Magistrate's Report and Recommendation).

Furthermore, the Fifth Circuit's determination that the State's suppression of this second statement thwarted Graves' ability to establish Cookie as the second perpetrator is also flawed. *Graves v. Dretke*, 442 F.3d at 343; *see also* Appendix A. First, a review of the record indicates that defense counsel may have consciously avoided implicating Cookie. Indeed, several instances in the record reflect that defense counsel objected to implications by the State that Cookie was involved. 38 SR 3727-29, 3788-89; 40 SR 4001, 4036; 42 SR 4203. And, as the district court pointed out, "this assertion overlooks the nature of the testimonial agreement itself." *See* Appendix B at 17 (Magistrate's Report and Recommendation).

> Obviously, the State could not limit the defense's ability to cross-examine Carter about Cookie if they so desired. The agreement only limited the State's right to do so. Graves' attorneys knew the State had indicted Cookie; that it was arguing a three-person theory; that Carter was very eager to protect Cookie; and that he had agreed to testify against Graves only in exchange for not being asked questions about he by the State. The defense therefore had the freedom and the opportunity to cross-examine Carter

about his wife's involvement.

Id. The district court's materiality analysis is clearly supported by the record. Graves failed to demonstrate a reasonable probability that disclosing the statement would have led to a different outcome. Therefore, Fifth Circuit erred in concluding that Graves had demonstrated a *Brady* violation. This issue merits certiorari review.

III. The Combined Effect of Carter's Two Statements Does Not Make Them Material.

Holding that the statements considered together were material, the court below reasoned,

> had the two statements been timely furnished to Graves he could have persuasively argued that (1) the murders were committed by Carter alone or by Carter and Cookie; and (2) Carter's plan from the beginning was to exonerate Cookie, but a story that he acted alone was not believable, so he implicated Graves so the prosecution would accept his story and decline to prosecute Cookie.

Graves v. Dretke, 442 F.3d at 343-44; *see also* Appendix A. But, considering all of the evidence the jury heard, the combined effect of the statements is not material and, as the district court observed, "could well have been damaging to [Graves]." *See* Appendix B at 17 (Magistrate's Report and Recommendation).

The jury was aware that Carter had implicated Graves from the outset. Moreover, this was not the first time the State had discussed a deal with Carter for his testimony against Graves. Indeed, the record reflects that a tentative agreement had been hammered out some six weeks before Carter's testimony. Importantly, Carter had already tentatively indicated a willingness to testify against Graves;

the sticking point was whether he would answer any questions involving Cookie.

Despite Graves' assertions to the courts below, Carter did not suddenly change his story on the eve of his trial testimony from "I did it all myself" to one that implicated Graves to strike a deal with the State to protect his wife. To the contrary, the evidence demonstrates that Carter had begun discussing a deal with the State at least six weeks before his trial testimony. 8 SR 3-4. In fact, Carter's defense attorney Walter Prentice testified before the jury regarding the terms of Carter's agreement with the State. 36 SR 3468-69. Moreover, the jury was aware that Carter first implicated Graves in the murders in August 1992, long before he made his deal with the State regarding Cookie, and long before his testimony at trial. 37 SR 3583-97; SX 191, 200 (statements by Carter to Texas Ranger Coffman). Thus, had the defense tried to make the argument to the jury that Carter had only implicated Graves on the eve of his testimony to protect Cookie, the State could have easily rebutted it with the foregoing evidence.

As the district court correctly concluded, the trial record indicated a tentative agreement with Carter to testify against Graves in exchange for not being asked about Cookie. EHT at 8 (citing 8 SR 3-4; EHT at 51). Thus, the district court correctly concluded, "the deal finally struck between Carter and the State was not the trigger for obtaining his testimony against [Graves] in the manner that [Graves] argues or that Carter would otherwise have testified to [Graves'] innocence." *See* Appendix C at 7 (Order and Opinion).

The record also belies Graves' claim that the defense had no evidence that Cookie was the second person at the crime scene. To the contrary, the defense was aware that Cookie had been indicted for the offense. EHT at 156. Furthermore, the defense was aware that Carter had shown deception on the polygraph in answering

questions about Cookie because Sebesta had stated so on the record. 35 SR 3360. Likewise, the State presented evidence to the jury through Carter's defense attorney Walter Prentice that Carter refused to testify as to any involvement of Cookie. 36 SR 3468-69; EHT at 156. The State also introduced evidence from jail personnel that Carter and Graves were trying to protect Cookie. 36 SR 3546; EHT at 157. These facts gave the defense ample information to point the finger at Cookie in an attempt to create reasonable doubt with respect to Graves, had the defense chosen to do so.

Given the record as a whole, the district court correctly reasoned that the combined effect of the statements did not raise a reasonable probability that the outcome of the trial would have been different:

> Although [Graves'] attorneys provide no argument on this issue, the disclosure of both of Carter's statements does not lead to a different conclusion. In fact, the combined effect could well have been damaging to [Graves]. The jury could not have believed both of Carter's contradictory claims. If they had been disclosed, this could have undermined any credibility the jury might otherwise have given to Carter's allegation that he acted alone. Unlike that claim, the statement implicating Cookie and Graves identified the missing third person the State had argued was involved. Given that the defense itself did not believe one person committed the murder, it is very unlikely the jury would have believed Carter's one-person version when it also had his three-person story that matched the evidence. The jury could also have taken Carter's three-person statement as more credible because it was strongly against his well-known desire to protect Cookie. Moreover, if both statements had been raised on cross-examination, the State would presumably have been able to point to Carter's two additional October 21 versions that implicated Graves

> (numbers 6 and 7 above).[4] This would have reinforced the consistency with which Carter had implicated Graves because, other than the exculpatory statement and the discredited grand jury testimony, all of Carter's accounts listed above named him as a participant in the murders.

See Appendix B at 17-18 (Magistrate's Report and Recommendation). As the district court correctly concluded, "Carter's undisclosed statements do not meet the materiality standard when considered alone or in combination, and [Graves] has not shown a *Brady* violation in this case." *Id.* The Fifth Circuit's holding to the contrary merits certiorari review by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

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For Criminal Justice

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[4] The court's parenthetical "(numbers 6 an 7 above)" refers to its numbered inventory of all of Graves' statements. *See* Appendix B at 12-13 (Magistrate's Report and Recommendation).

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